STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED May 22, 2007
v	No. 259303 Jackson Circuit Court
MATTHEW JAY SHERWOOD, Defendant-Appellant.	LC No. 04-000824-FH

Before: Cooper, P.J., and Murphy and Neff, JJ.

PER CURIAM.

Defendant appeals as of right from his conviction of committing a fraudulent insurance act, MCL 500.4511(1). We affirm. This appeal has been decided without oral argument pursuant to MCR 7.214(E).

Defendant argues that there was insufficient evidence to establish that he intended to defraud the insurer, which is required under MCL 500.4511(1) by reference to MCL 500.4503(a).[1] This Court reviews de novo a claim of insufficient evidence, *People v Lueth*, 253 Mich App 670, 680; 660 NW2d 322 (2002), to determine whether, viewing the evidence in the light most favorable to the prosecution, a rational trier of fact could find that all the elements of the crime were proven beyond a reasonable doubt. *People v Tombs*, 472 Mich 446, 459; 697 NW2d 494 (2005).

Considering the evidence in the light most favorable to the prosecutor, we hold there was sufficient evidence of fraudulent intent by defendant. "Intent generally may be inferred from the facts and circumstances of a case." *People v Jory*, 443 Mich 403, 419; 505 NW2d 228 (1993). Here, the evidence showed that defendant indicated on his insurance enrollment paperwork *after* divorcing his ex-wife that he was in fact married to her. He also listed her son as a dependent even though the consent judgment of divorce provided that another named man was the biological father of the then-unborn child and that defendant was not the father.

[1] MCL 500.4503: "A fraudulent insurance act includes, but is not limited to, acts or omissions committed by any person who knowingly, and with an intent to injure, defraud, or deceive . . ."

Defendant claims he mistakenly believed he could list his ex-wife and her son as dependents because: (1) he was told by a bookkeeper with his previous employer that he could add them as dependents for insurance coverage because he was the primary wage earner, and (2) he considered his ex-wife to be his common-law wife because they continued to live together as husband and wife after the divorce.[2]

The prosecution is not required to rule out every arguable theory of innocence, but is only required to prove its theory beyond a reasonable doubt. *People v Nowack*, 462 Mich 392, 400; 614 NW2d 78 (2000). We find that the prosecution proved its theory of the case beyond a reasonable doubt despite defendant's claim of innocent intent.

Defendant's explanations for including his ex-wife and her child on his insurance enrollment form call into question his credibility. That testimony was contradicted in large measure by the testimony of other witnesses and the circumstantial evidence. Considerations of credibility and the weighing of evidence are matters that are properly left to the jury. *People v Fletcher*, 260 Mich App 531, 561; 679 NW2d 127 (2004). The bookkeeper denied defendant's allegations that she told him he could claim the two as dependents for insurance purposes after the divorce because he was their primary wage earner and denied saying he could simply keep his insurance the same when he changed jobs from one township to the other. Defendant's claim of innocent intent is also undermined by the fact that the child was not included on his insurance before transferring jobs and by his admission that he wasn't sure whether the child was insured before transferring jobs. With respect to defendant's common-law marriage argument, the jury heard testimony that defendant did not mention this theory when an administrator first questioned him about the insurance issue. The jury could reasonably conclude that this argument was contrived after the fact.

Defendant next argues that, although intent may generally be inferred from circumstantial evidence, "[w]here a defendant's acts are of themselves commonplace or equivocal, and are as consistent with innocent activity as they are with criminal, it will be necessary for the government to adduce objective facts to establish criminal intent." *Jory*, *supra* at 419. In *Jory*, the complainant alleged silent fraud after she entered into a land contract to purchase property from the defendant because he allegedly did not tell her the property was encumbered by a mortgage. The Court held, "[T]he terms of this transaction were commonplace to people familiar with real estate transactions, and that it is not unusual for property already encumbered to be sold on a land contract." *Id*. at 424. It is not similarly commonplace for a divorced person to list his or her former status as married on insurance paperwork, to claim to be married to a former spouse, or to list a former spouse's child, who was acknowledged to be some else's biological child, as a dependent. Nor are defendant's statements that he was married and that the child was his dependent equivocal statements.[3] Defendant's reliance on *Jory* is misplaced

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[2] Michigan does not recognize common-law marriages purportedly contracted within Michigan. *Matter of Estate of Burroughs*, 194 Mich App 196, 197; 486 NW2d 113 (1992). It is undisputed that defendant and his ex-wife lived together in Michigan during all times pertinent to this case.

[3] Defendant does not dispute that he was provided with a booklet providing who would qualify as a dependent when he signed both enrollment forms, the jury heard testimony that both his ex-

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because the acts in question are simply not "of themselves commonplace or equivocal, and are as consistent with innocent activity as they are with criminal." *Id*. at 419.[4] The jury was free to infer intent from the circumstantial evidence and to accept or reject defendant's explanation.

Defendant also argues he relied on his employer to notify him of any problems with his insurance enrollment by indicating on different forms (which were given to the employer at different times) that he was living with his ex-wife and later indicating he was married to her. Again, considerations of credibility or the weighing of evidence are properly left to the jury. *Fletcher, supra* at 561.

Defendant also argues that his employer did not fulfill its obligation to the insurer to make sure the applicant and each listed dependent were eligible for coverage. Whether the employer may have breached its duty to the insurer is irrelevant to whether there was sufficient evidence that defendant committed a fraudulent insurance act. Under MCL 500.4511(1) and by reference under MCL 500.4503(a), the issue is whether defendant, when applying for insurance, made a false statement with intent to defraud the insurer, not whether defendant's employer breached its obligations to the insurer or could have stopped defendant. See *People v Genovese*, 53 Mich App 657, 661, 220 NW2d 207 (1974) (holding that it is no defense to the charge of obtaining a controlled substance by forgery that the pharmacist who filled the prescription knew or should have known that the prescription was forged because the statute concerned the conduct of the person obtaining the prescription).

Although defendant also argues in a footnote in his appellate brief that he is the legal and equitable father of the child, he has not cited where in the lower court record this issue was preserved for appellate review.[5] In any event, the cases cited by defendant to support his argument that he is presumed to be the child's legal father are inapplicable because none address the situation where it had been acknowledged in a consent judgment that the purported father is not the father. Defendant is correct that when a child is born or conceived during a marriage, the husband is *presumed* to be the father. *Aichele v Hodge*, 259 Mich App 146, 158; 673 NW2d 452 (2003). However, defendant admitted in the consent judgment of divorce that he was not the biological father of his ex-wife's then-unborn child, and he and his ex-wife testified on the record at the divorce proceeding that he was not the father. The wife also testified that her affidavit in the divorce proceeding, which stated that defendant was not father of the then-unborn child, was based on a DNA test that identified another man to be the father. Further, even

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wife and the child would not qualify as dependents according to the booklet, and the booklet was presented to the jury.

[4] Although defendant also cites *People v Getchell*, 6 Mich 496 (1859) in this regard, *Getchell* is inapplicable because it did not address sufficiency of evidence but held that the trial court erred in excluding evidence that defendant did not possess the requisite intent. *Id*. at 504-506.

[5] An appellant has the burden of showing by specific page references to the record that an issue has been preserved for appellate review. See MCR 7.212 (C)(7); see also *People v Milstead*, 250 Mich App 391, 404, n 8; 648 NW2d 648 (2002) (holding that an issue was not preserved when the appellant failed to provide a citation to the record to demonstrate where the issue had been presented below).

assuming defendant would have some legal or equitable claim that he should be determined to be the child's father despite the consent judgment that he is not the father, it is undisputed that defendant had not yet established paternity or guardianship over the child at any time pertinent to this case.

Affirmed.

/s/ Jessica R. Cooper
/s/ William B. Murphy
/s/ Janet T. Neff